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From:

Sent: Thursday, May 19, 2011 1:56:28 PM

To:

Cc:

Subject: FW: Actions constituting an Examination - 2nd scenario

Below is the response I received. Let me know if you need anything further.

The issue is whether the actions taken by the revenue agent constitute an examination or a survey of the six tax years at issue. While the agent indicated that one of the six years had been examined and the remainder had been surveyed, the concern is that, because a Form 870 was signed for all six years, all of the years may be considered to have been examined.

Neither the Code nor the regulations provide an express definition of "examination" or "survey." Section 7602(a) implicitly defines an examination as an inspection of the taxpayer's books and records, the summoning of persons and documents, and the taking of testimony for the purposes of determining a taxpayer's correct tax liability or collecting such liability. Section 7602(a)(1) authorizes the Service "[t]o examine any books, papers, records, or other data which may be relevant" for the purpose of ascertaining the correctness of any return. Section 601.105 of the Statement of Procedural Rules (26 CFR Part 601), addressing examination of returns, uses the term "examination" in describing the inspection of the taxpayer's books and records for the purpose of determining the taxpayer's correct tax liability. Section 4.03 of Rev. Proc. 2005-32 lists actions taken by the Service that are *not* examinations, inspections, or reopenings. Looking at a tax return is not an examination. Rev. Proc. 2005-32 sec. 4.03(1)(a). Section 4.03(1)(d) of the rev. proc. provides examples to illustrate actions that are not examinations, inspections or re-openings. These examples include Service contact with a taxpayer to correct mathematical or clerical errors and adjustments resulting from an unallowable item. Rev. Proc. 2005-32 sec. 4.03(1)(d)(ii)(A), (iii)(A).

The Tax Court has held that no examination occurred absent inspection of a taxpayer's books of account or a formal audit. Benjamin v. Commissioner, 66 T.C. 1084, 1097 (1976). "To inspect the 'books of account' would require, at a minimum, that the respondent have access to and physically view a taxpayer's books and records." Id. at 1098. A review of a tax return and its accompanying schedules does not constitute an inspection of a taxpayer's 'books of account.'" Guerkink v. United States, 354 F.2d 629 (7th Cir. 1965).

IRM 4.36.3.4 addresses surveys after assignment in the context of the Joint Committee Procedures. "Returns in Joint Committee cases may be surveyed after assignment if the returns would normally have been surveyed before or after assignment except for the fact that the returns require Joint Committee review. The examiner can survey some or all of the returns." IRM 4.36.3.4.1. While the IRM does not provide a definition of what constitutes a survey, it does describe survey procedures in various contexts; it also contrasts survey procedures with examination procedures. "Claims for refund may be allowed without examination or contact with the taxpayer where the examiner concludes, after survey of the case file, that the claim is clearly allowable in full. Any such claim which, if allowed, would produce an overassessment and/or overpayment exceeding \$200,000 may be allowed without examination, but only after notification is received from the Joint Committee on Taxation that the Service may proceed with the disposition of the claim as proposed in the report submitted under the provisions of section 6405(a) of the

Code." Policy Statement 4-77, IRM 1.2.1.4.21. "While cases should be selected and started in accordance with these priorities, in a limited number of circumstances there may be returns that appear in the judgment of the examiner and manager to warrant survey without taxpayer contact." IRM 4.1.3.5(1). "There must be sufficient documentation in the examiner's case file to justify that an examination is not warranted." IRM 4.36.3.4.2(1). "The examiner's request for retained copies of the taxpayer's tax returns, prior RARs, or information otherwise available from public sources is within the confines of a survey action." IRM 4.36.3.4.2(2). "However, if the examiner makes an inspection of any portion of the taxpayer's books and records (except as provided in this section) or discusses any potential issues with the taxpayer, the return may not be surveyed under this procedure." IRM 4.36.3.4.2(3).

We conclude from the authorities cited that while an examination permits contact with the taxpayer and examination of books and records, a survey does not; a survey is limited to review of a tax return in a case where examination is not warranted or necessary. From the facts we received, it appears as though one year was examined and that five years were surveyed. Merely reviewing tax returns and adjusting computations does not rise to the level of an examination.

The taxpayer's signing of a Form 870 does not alter this determination; Rev. Proc. 2005-32 provides that corrections and adjustments may be made to a taxpayer's liability in actions other than examinations. IRM 4.10.8.4.2 provides that the Service should use Form 870 series to close Joint Committee cases. The Form 870 series includes Form 870, "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment" and Form 870-AD, "Offer to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment." A Form 870 is not a final agreement with respect to a taxpayer's tax liability for a given year, as its language clearly states: "Your consent will not prevent you from filing a claim for refund (after you have paid the tax) if you later believe you are so entitled. It will not prevent us from later determining, if necessary, that you owe additional tax; nor extend the time provided by law for either action." A Form 870 merely allows the Service to immediately assess a deficiency and its use is not limited to cases where an examination has occurred.

Please contact me should you have any questions or concerns with respect to this advice.